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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/576,540

01/12/2007

Leonardo Jose S. Aquino

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EXAMINER

PADEN, CAROLYN A

ART UNIT

PAPER NUMBER

1781

NOTIFICATION DATE

DELIVERY MODE

09/23/2010

ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

patentgroupus@unilever.com

<b>Office Action Summary</b>	<b>Application No.</b> 10/576,540	<b>Applicant(s)</b> AQUINO ET AL.	
	<b>Examiner</b> Carolyn A. Paden	<b>Art Unit</b> 1781	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 01 September 2010.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1,2,4,7,8,10 and 11 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,2,4,7,8,10 and 11 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |   |   |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                    | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)         | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____   | 6) <input type="checkbox"/> Other: _____                          |

The objection to claims 8, 10 and 11 has been withdrawn in response to applicants' amendments to the claims.

Claims 1, 2, 4 and 7 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-6 of U.S. Patent No. 7,510,737. Although the conflicting claims are not identical, they are not patentably distinct from each other because it is not seen that the inclusion of a dairy base in the emulsion of the claims constitutes unobviousness, particularly when the prior patent suggests the use of butter fat as a fat source in claim 2.

Applicants' terminal disclaimer has been received but has not been approved because the language in the terminal disclaimer does not comply with the requirements for terminal disclaimers. Specifically, in lines 3-4 of the terminal disclaimer, the statutes defined should be 35 USC 154 and 173 and not 35 USC 154-156 and 173.

Claims 1, 2, 4 and 7 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-13 of copending Application No. 10/576,704. Although the conflicting claims are not identical, they are not patentably distinct from

each other because it is not seen that the co-pending claims are patentably distinct from the present claims.

Applicants' terminal disclaimer has been received but has not been approved because the language in the terminal disclaimer does not comply with the requirements for terminal disclaimers. Specifically, in lines 3-4 of the terminal disclaimer, the statutes defined should be 35 USC 154 and 173 and not 35 USC 154-156 and 173.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 2, 4 and 7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bialek for reasons of record.

Applicants' argument regarding the priority date of the Bialek reference is not sufficient to overcome the rejection of the claims because applicants statement does not mentioned who owned the invention at the time the invention was made. Accordingly the rejection is maintained.

Claims 1, 2, 4 and 7 are provisionally rejected under 35 U.S.C. 103(a) as being obvious over copending Application No. 10/576,704 which has a common inventor with the instant application. Based upon the earlier effective U.S. filing date of the copending application, it would constitute prior art under 35 U.S.C. 102(e) if published or patented. This provisional rejection under 35 U.S.C. 103(a) is based upon a presumption of future publication or patenting of the conflicting application.

Applicants' argument regarding the priority date of the Bialek reference is not sufficient to overcome the rejection of the claims because applicants statement does not mentioned who owned the invention at the time the invention was made. Accordingly the rejection is maintained.

This provisional rejection might be overcome either by a showing under 37 CFR 1.132 that any invention disclosed but not claimed in the copending application was derived from the inventor of this application and is thus not the invention "by another," or by a showing of a date of invention for the instant application prior to the effective U.S. filing date of the copending application under 37 CFR 1.131. This rejection might also be overcome by showing that the copending application is disqualified under

35 U.S.C. 103(c) as prior art in a rejection under 35 U.S.C. 103(a). See MPEP § 706.02(I)(1) and § 706.02(I)(2).

The rejection of the claims over Farrer in view of Han has been withdrawn for the reasons argued by applicant.

Claims 1, 2, 4, 8 and 10-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over vom Dorp as further evidenced by Francis and in view of Fischer for reasons of record.

Applicant argues that one would not look to Vom Dorp for a process relating to insoluble fruit fibers for low fat foods. This has been considered but is not persuasive. Yoghurt, disclosed in Vom Dorp, is well known in the art to contain fruit and is also well known to as a low fat food. One of ordinary skill in the art, when looking at the process of the claims, would be expected to look beyond the claimed preamble to the composition, which includes yoghurt as a dairy base. One of ordinary skill in the art would be expected to be aware of ingredients that are included in yoghurt that would add value to the nutritional value of yoghurt because of the healthy qualities associated with yoghurt. Vom Dorp uses a fiber source in yoghurt.

Applicant argues that one would not learn from Francis to carry out homogenization at the temperature and pressures of the claims. It is the

examiners' position that one of ordinary skill in the art of processing dairy bases, such as yoghurt, would be familiar with two stage homogenization and be able to optimize the conditions for homogenization to the specific product of the claims.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn A Paden whose telephone

number is (571) 272-1403. The examiner can normally be reached on Monday to Friday from 7 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached by dialing 571-272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Carolyn Paden/

Primary Examiner 1781



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